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8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 In re) Case No. 98-02537-B7
12 BARBARA ANN ROGERS,) MEMORANDUM DECISION
13 Debtor.)
14 _____)

15 Debtor is a very sympathetic individual with multiple
16 medical problems which have rendered her effectively disabled.
17 During the decline she incurred substantial medical bills.
18 However, she was able to maintain her home and substantial non-
19 exempt equity in it. Shortly before bankruptcy, she borrowed
20 against the non-exempt portion of the equity in her home (the
21 amount in excess of consensual liens plus the allowed homestead
22 exemption), and put the proceeds in a Providian Life and Health
23 Insurance Annuity.

24 Upon filing bankruptcy under Chapter 7, debtor listed the
25 annuity, and claimed it exempt under California Code of Civil
26 Procedure § 704.100. The Chapter 7 trustee filed a timely

1 objection, and the debtor thereafter amended her Schedule C to
2 claim the annuity exempt under C.C.P. § 704.115. That section
3 provides in pertinent part:

4 (a) As used in this section, "private
5 retirement plan" means:

6 (1) Private retirement plans,
7 including, but not limited to,
8 union retirement plans.

9 (2) Profit-sharing plans
10 designed and used for retirement
11 purposes.

12 (3) Self-employed retirement
13 plans and individual retirement
14 annuities or accounts provided for
15 in the Internal Revenue Code of
16 1954 as amended, to the extent the
17 amounts held in the plans,
18 annuities, or accounts do not
19 exceed the maximum amounts exempt
20 from federal income taxation under
21 that code.

22 (b) All amounts held, controlled, or in
23 process of distribution by a private
24 retirement plan, for the payment of benefits
25 as an annuity, pension, retirement allowance,
26 disability payment, or death benefit from a
private retirement plan are exempt.

19 If debtor's annuity falls under subpart (a)(1), (2) or (3), it is
20 exempt. However, which subpart it falls under is important
21 because § 704.115(e) provides in relevant part that "the amounts
22 described in paragraph (3) of subdivision (a) are exempt only to
23 the extent necessary to provide for the support of the judgment
24 debtor when the judgment debtor retires" In re MacIntyre,
25 74 F.3d 186, 188 (9th Cir. 1996).

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1 It is clear from debtor's Opposition, and Amended
2 Opposition, that debtor is asserting that the annuity is exempt
3 under (a)(3) because debtor argues it is an annuity like the
4 annuity in In re Bernard, 40 F.3d 1028 (9th Cir. 1994), cert.
5 denied 115 S.Ct. 1695 (1995). Debtor argues here, in contrast to
6 Bernard, that her annuity is necessary for her retirement.

7 At first glance, it is easy to see how debtor might have
8 been misled by the Bernard decision. In Bernard, the debtors had
9 borrowed against their non-exempt equity in their home and, ten
10 days before filing bankruptcy, purchased a \$250,000 annuity
11 contract. The debtors asserted the annuity was exempt under
12 C.C.P. § 704.100 as an unmaturred life insurance policy and,
13 alternatively, under § 704.115. The Ninth Circuit rejected the
14 claim of exemption under § 704.100 based on its prior affirmance
15 in In re Pikush, 157 B.R. 155 (9th Cir. BAP 1993), aff'd 27 F.3d
16 386 (9th Civ. 1994).

17 The Ninth Circuit then turned to the claim of exemption
18 under § 704.115. The court wrote:

19 Annuities are exempt under this provision
20 only to the extent necessary to provide for
21 the support of the debtor and the debtor's
22 spouse and dependents upon retirement. The
23 bankruptcy court found that the annuity
24 payments weren't necessary for the Bernards'
25 support. (Citation omitted.) This finding
26 is not clearly erroneous.

24 40 F.3d at 1032-1033.

25 Thus, a casual reading of Bernard might seem to support
26 debtor's position--that a person could draw down non-exempt home

1 equity and purchase an annuity contract that will be exempt to
2 the extent necessary to support the debtor and dependents in
3 retirement. However, closer scrutiny of C.C.P. § 704.115(a)(3),
4 and Bernard, yields a different conclusion.

5 As already noted, § 704.115(a)(3) exempts to the extent
6 necessary:

7 (3) Self-employed retirement plans and
8 individual retirement annuities or accounts
9 provided for in the Internal Revenue Code of
10 1954 as amended, to the extent the amounts
11 held in the plans, annuities, or accounts do
12 not exceed the maximum amounts exempt from
13 federal income taxation under that code.
14 (Emphasis added.)

15 The emphasized language modifies the preceding phrases including,
16 for present purposes "individual retirement annuities". To
17 qualify for exemption under § 704.115(a)(3) the annuity must
18 be one provided for in the Internal Revenue Code, and the
19 accumulations in the annuity must not have exceeded the
20 "amounts exempt from federal income taxation". The California
21 legislature had specific attributes of individual retirement
22 annuities and individual retirement accounts in mind when it
23 enacted C.C.P. § 704.115(a)(3). One does not have to look far to
24 find what the legislature had in mind, either.

25 Section 408 of Title 26, United States Code (Internal
26 Revenue Code), spells out in detail the qualifying attributes
of individual retirement accounts (IRAs) in 26 U.S.C. § 408(a).
Section 408(b) addresses in comparable detail individual
retirement annuities. It provides in relevant part:

1 (b) Individual retirement annuity. --
2 For purposes of this section, the term
3 "individual retirement annuity" means an
4 annuity contract, or an endowment contract
5 (as determined under regulations prescribed
6 by the Secretary), issued by an insurance
7 company which meets the following
8 requirements:

9 (1) The contract is not
10 transferable by the owner.

11 (2) Under the contract--

12 (A) the premiums are not fixed,

13 (B) the annual premium on behalf
14 of any individual will not exceed
15 \$2,000, and

16 (C) any refund of premiums will be
17 applied before the close of the calendar
18 year following the year of the refund
19 toward the payment of future premiums or
20 the purchase of additional benefits.

21 (3) Under regulations prescribed by the
22 Secretary, rules similar to the rules of
23 section 401(a)(9) and the incidental death
24 benefit requirements of section 401(a) shall
25 apply to the distribution of the entire
26 interest of the owner.

(4) The entire interest of the owner is
nonforfeitable.

Debtor's annuity contract clearly does not meet the elements
of an individual retirement annuity under 26 U.S.C. § 408(b), in
part because of debtor's lump sum premium payment which far
exceeded \$2,000. Debtor has made no attempt to show how her
annuity could qualify under § 408(b), and there is nothing in the
annuity contract itself which would support an argument that the
annuity does qualify. The riddle of In re Bernard is equally
easy to resolve. The issue of whether the annuity qualified

1 under C.C.P. § 704.115(a)(3) was not raised. Instead, the
2 Bankruptcy Court determined that it was not necessary for support
3 in retirement. On appeal, the Ninth Circuit reviewed that
4 factual finding and held it was not clearly erroneous. The Ninth
5 Circuit had no need to reach the issue of whether the annuity
6 qualified under § 704.115(a)(3) because even if it otherwise
7 qualified the Bernards were not entitled to any exemption because
8 the annuity was not necessary to their support in retirement.
9 In re Bernard should not be read to hold that any annuity a
10 debtor wants to purchase is exempt to the extent necessary,
11 because a) it does not so hold; and b) C.C.P. § 704.115(a)(3)
12 places express limitations on annuities which may qualify under
13 it for any claim of exemption.

14 While the debtor has not argued for it, the Court has looked
15 to the other subparts of C.C.P. § 704.115(a) to see if debtor's
16 annuity might fit another exemption. However, the Court
17 concludes it does not. Clearly, the annuity is not a self-
18 employed retirement plan or a qualifying IRA under (a)(3). Nor
19 is it a qualified profit-sharing plan under (a)(2). Subpart
20 (a)(1) exempts "Private retirement plans, including, but not
21 limited to, union retirement plans."

22 As other courts have recognized, C.C.P. § 704.115(a)(1) is
23 vague and undefined. In re Phillips, 206 B.R. 196 (Bankr. N.D.
24 Ca. 1997). But this Court agrees with the Phillips court that
25 whatever the legislature may have meant to encompass within
26 (a)(1), it does not extend to protect anything a debtor

1 unilaterally chooses to claim as intended for retirement
2 purposes. The legislature does give us some hints about (a)(1)
3 by identifying union retirement plans as an example. Another
4 hint lies in the hierarchy or priority of exemption established
5 by the legislature. Strictly regulated IRAs and individual
6 retirement annuities which are self-funded are only exempt to the
7 extent necessary for support. Profit-sharing plans "designed and
8 used for retirement purposes" are fully exempt, however, thus
9 illustrating a higher order of preference. Schwartzman v.
10 Wilshinsky, 50 Cal.App. 4th 619 (Second Dist. 1996). So, also
11 are plans which qualify under (a)(1). But they do not include
12 exclusively self-funded plans unless they qualify through a
13 professional corporate entity. See, e.g., In re Cheng, 943 F.2d
14 1114 (9th Cir. 1991); In re Witwer, 148 B.R. 930 (Bankr. C.D. Ca.
15 1992). If a person were permitted to claim any asset as a
16 "private retirement plan", and thus fully exempt, the "necessary
17 for support" limitation for plans under (a)(3) would be
18 eviscerated.

19 For the foregoing reasons, the Court concludes that debtor's
20 annuity is not exempt under C.C.P. § 704.115(a) because it does
21 not meet the requirements for qualification for exemption under
22 any of subparts (a)(1), (a)(2), or (a)(3). The Court does not
23 reach the issue of whether the annuity would be necessary for the
24 debtor's support in retirement if the annuity otherwise qualified
25 under (a)(3). To the extent the debtor's claim of exemption is
26 premised on C.C.P. § 704.115, the trustee's objection to the

1 claim of exemption in the annuity is sustained, and the claim of
2 exemption is disallowed.

3 As noted, debtor initially claimed the annuity exempt under
4 C.C.P. § 704.100 as a form of unmatured life insurance. After
5 the trustee's objection, the debtor substituted § 704.115. But
6 her brief continued to argue that § 704.100 might apply. The
7 Court disagrees. That issue was squarely addressed in In re
8 Pikush, 157 B.R. 155 (9th Cir. BAP 1993), and rejected. Pikush
9 was affirmed on appeal to the Ninth Circuit, 27 F.3d 386 (1994).
10 The claim was briefly revisited in In re Bernard, 40 F.3d 1028,
11 1032 (9th Cir. 1994), and soundly rejected. Those rulings
12 control the present situation to the extent the debtor is still
13 asserting a claim of exemption under C.C.P. § 704.100. Such a
14 claim of exemption in the present case on the instant record is
15 denied.

16 The foregoing constitutes the findings and conclusions of
17 the Court. Counsel for the trustee shall prepare and lodge a
18 separate form of order consistent with the foregoing within
19 twenty (20) days of the date of service of this Memorandum
20 Decision.

21 IT IS SO ORDERED.

22 DATED: July 9, 1998

23
24 S/Peter W. Bowie

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PETER W. BOWIE, Judge
26 United States Bankruptcy Court